

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

IN RE: PROPULSID	:	MDL NO. 1355
	:	
PRODUCTS LIABILITY LITIGATION	:	SECTION "L"
	:	
	:	JUDGE FALLON
.....	:	

THIS DOCUMENT RELATES TO CIVIL ACTION NO. 01-2510

ORDER

Before the Court is plaintiffs' motion to amend and for order of remand in consolidated civil action No. 01-2510 captioned *Ronald J. Helberg, et al. v. Janssen Pharmaceutica, Inc., et al.* For reasons set forth below the motion is DENIED.

On April 10, 2001, plaintiffs filed a wrongful death action in California Superior Court against Janssen Pharmaceutica, Inc. At the same time, plaintiffs also filed a notice of intent to bring an against David Price, M.D., Carl Anderson, M.D., and John Rich, D.D.S. Under California law the notice tolled the statute of limitations on claims against the doctors for 90 days.

On May 18, 2001, Janssen removed the action to federal court on the basis of diversity of citizenship. The federal action was subsequently transferred to this Court after being designated a tag-along action in *In re Propulsid Products Liability Litigation MDL-1355*.

On July 16, 2001, plaintiff filed a second state court action which initially named only the doctors but was later amended to add Janssen. The Superior Court of California, County of Sonoma–Civil Division denied plaintiffs' motion to stay the state court action on the grounds that an identical federal action was pending.

Plaintiffs filed the present motion to amend and remand on December 23, 2001. The proposed amendment would add as defendants the doctors named in the California state court proceeding. Plaintiffs argue that allowing the amendment would be in the best interest of justice. On the other hand, defendant argues that the amendment is futile insofar as the claims raised against the doctors have prescribed under California law.

According to defendant, pursuant to California Code of Civil Procedure § 340.5, plaintiff had one year from the death of their decedent to file an action against the doctors. Prior to filing that action, plaintiffs were required by Section 346 to give notice to the doctors. Citing the case of *Woods v. Young*, 53 Cal.3d 315 (1991), defendant contends that the statute of limitations on plaintiffs' claims against the doctors was tolled for 90 days from the date of service of the notice. According to defendant, because plaintiff served notice on the doctors on April 5, 2001, the statute of limitations on those claims expired in July 2001. Defendant points out that the plaintiffs did not seek to add the defendant doctor until December 2001.

The Federal Rules of Civil Procedure include a liberal policy in favor of permitting pleading amendments. Leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), but "is by no means automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir.1993).

Relevant factors to consider include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Id.*

In this case the claims raised against the doctors appear on the face of the petition to have prescribed. Plaintiffs do not argue otherwise. The Court finds that the amendment is futile, and accordingly, the motion to amend and remand is DENIED.

New Orleans, Louisiana this 27th day of June, 2002

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE